FILE COPY

Supreme Court, U.S.
FILED
MAR 7 1972
E. ROBERT SEAVER, CLERK

No. 71-110

In the Supreme Court of the United States

OCTOBER TERM, 1971

DAVID GELBARD AND SIDNEY PARNAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
ALLAN A. TUTTLE,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
SHIRLEY RACCUS-LOBEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of Argument	5
Argument:	
I. Grand jury witnesses have not been permitted to challenge the evidence that led the grand jury to call them or which provided the basis for questions asked them	7
II. Neither the Omnibus Crime Control Act of 1968, 18 U.S.C. 2510, *et seq.*, nor the Organized Crime Control Act of 1970, 18 U.S.C. 3504, alters the rule that grand jury witnesses cannot challenge the source of the grand jury's evidence	10
Conclusion	20

CITATIONS

Cases:

Alderman v. *United States*, 394 U.S. 165 — 6, 8, 11, 12–13, 17
Blair v. *United States*, 205 U.S. 273 — 10
Blue v. *United States*, 384 U.S. 251 — 8, 9, 10
Piemonte v. *United States*, 367 U.S. 556 — 9
United States v. *Johnson*, 317 U.S. 503 — 10
Wong Sun v. *United States*, 371 U.S. 471 — 11

459-153—72——1

Constitution, statutes and rule:

	Page
Constitution of the United States, Fourth Amendment	5, 8
18 U.S.C. 371	3
18 U.S.C. 1084	3
18 U.S.C. 1952	3
Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq*	2, 4, 5, 10, 14, 19
18 U.S.C. 2515	12
18 U.S.C. 2516	19
18 U.S.C. 2517	19
18 U.S.C. 2518	2, 3, 4, 6, 10, 11, 12, 15, 16, 19
Organized Crime Control Act of 1970, 18 U.S.C. 3504	2, 6, 10, 12, 13, 14, 15, 16, 17, 19
28 U.S.C. 1826(a)	2
F.R. Crim. P., Rule 41(e)	6, 11

Miscellaneous:

116 Cong. Rec., 91st Cong., 2d Sess., No. 175, p. H9653	18
116 Cong. Rec., 91st Cong., 2d Sess., No. 179, p. S17775	17, 18
H. Rep. No. 1549, 91st Cong., 2d Sess	13, 14, 15, 16, 17, 18
S. Rep. No. 617, 91st Cong., 1st Sess	13, 14, 15, 16, 17, 19

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-110

DAVID GELBARD AND SIDNEY PARNAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is reported at 433 F. 2d 837.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1971. A petition for rehearing was denied on June 23, 1971. The petition for a writ of certiorari was filed on July 22, 1971, and certiorari was granted on December 14, 1971. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq.*, or the Organized Crime Control Act of 1970, 18 U.S.C. 3504, altered the rule that a witness before a grand jury has no standing to question the source of the government's evidence, by permitting a witness to refuse to answer questions on the basis of the witness' allegation that the grand jury's subpoena or questions propounded before the grand jury are the result of illegal electronic surveillance.

STATUTES INVOLVED

The pertinent provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq.*, and the Organized Crime Control Act of 1970, 18 U.S.C. 3504, are set forth in an Appendix to our brief filed in *United States* v. *Egan*, No. 71-263, October Term, 1971, at pp. 31-34.

STATEMENT

This case arises from judgments of civil contempt entered pursuant to 28 U.S.C. 1826 against petitioners by the United States District Court for the Central District of California. The civil contempts were based on petitioners' refusals to answer questions before a federal grand jury solely on the ground that their subpoenas and the grand jury's questions were based upon allegedly illegal electronic surveillance.

During a court-authorized monitoring of the telephone of one Perry Paul,[1] conversations between Paul and petitioner Gelbard relating to the placement of wagers were overheard. Similarly, during a court-authorized monitoring of the telephone of one Jerome Zarowitz,[2] conversations between Zarowitz and petitioner Parnas were overheard respecting bookkeeping procedures relating to gambling proceeds.

Petitioners Gelbard and Parnas were subpoenaed to appear before a federal grand jury. Both moved to suppress any evidence obtained pursuant to the court-authorized electronic interceptions, to declare 18 U.S.C. 2518 unconstitutional and to stay their appearance before the grand jury until these matters were resolved (A. 19–27, 47–48, 58–84). At the hearing on the motions the government acknowledged that questions to be asked of petitioners would be based upon their intercepted conversations (A. 43, 63). The government further stated that neither petitioner was contemplated as a defendant in any possible resulting indictment, but rather had been summoned to testify concerning their knowledge of others: petitioner Parnas' testimony was sought with respect to Zaro-

[1] The order of interception was entered on October 22, 1970, pursuant to 18 U.S.C. 2518. The interception commenced on October 23, 1970, and terminated on November 6, 1970. The interception related to an investigation by the F.B.I. into violations of 18 U.S.C. 371, 1084 and 1952.

[2] The order of interception was entered on November 17, 1970. The interception commenced on November 18, 1970 and terminated on December 12, 1970.

witz; petitioner Gelbard's with respect to one Gerald Kilgore.[3] The district court denied the motions (A. 43, 86–88).

Both petitioners appeared before the grand jury but refused to answer questions based upon the intercepted conversations until they had been given copies of the wiretap applications and orders and transcripts of the intercepted conversations (A. 89–103). Neither petitioner asserted the privilege against self-incrimination.

Following a hearing, the district court held petitioners in civil contempt and committed them until they answered questions, or for the life of the grand jury.[4] The court of apeals affirmed, stating that it "appears to be settled that a witness in a grand jury proceeding has no right to resort to a court to secure authoritative advance determination concerning evidentiary matters that arise, or may arise, or to exclude evidence to be used in such a proceeding" (Pet. App. 2; 443 F. 2d 837, 838). The court noted that nothing in the wiretaping provisions of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2510, including specifically 18 U.S.C. 2518(10)(a), changed this general rule.

---

[3] Both Kilgore and Zarowitz were then defendants in indictments pending in the Central District of California; however, the government represented that the matters as to which the petitioners' testimony was sought were not related to the pending cases.

[4] The commitment of the petitioners has been stayed successively by the district court, the court of appeals and Mr. Justice Douglas.

SUMMARY OF ARGUMENT

I

The government's response to petitioners' principal contention—that grand jury witnesses may refuse to answer questions upon their allegation that their subpoenas and questions asked them are based upon allegedly illegal electronic surveillance—is fully set forth in the government's brief in *United States* v. *Egan* (No. 71-263, October Term, 1971), upon which we here rely. We there suggest that the right asserted by petitioners would entail a novel extension of the exclusionary rule of the Fourth Amendment. Traditionally the exclusionary rule has been invoked to prohibit the introduction against the victim of an illegal search of any evidence so obtained. The rule urged by the petitioners would permit the victim of such a search to suppress the use of evidence so obtained against third persons.

Historically grand jury witnesses have not been permitted to challenge the source or kind of the government's evidence. Congress should not be deemed to have changed these settled principles in the absence of a clear intention to do so. The statutes relied upon evidence no such intention.

II

Petitioners principally rely upon the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* As our brief in *Egan* indicates, the language of the statute and its legislative

history show no congressional intent to permit grand jury witnesses to refuse to testify until the government proves the validity of its evidence. We here add the observation that the use in Section 2518(10)(a) of the term "aggrieved person" was not intended to confer standing to move to suppress upon any person allegedly illegally overheard, but rather to incorporate into the Act the body of law surrounding the use of the same term in Rule 41(e), Fed.R.Crim.P. (*Alderman* v. *United States*, 394 U.S. 165). The term "aggrieved person" should not be construed as petitioners would have it, since Rule 41(e) plainly does not confer upon any victim of an allegedly illegal search the right at trial to suppress the use of such evidence against third parties.

In this brief we consider petitioner Gelbard's special reliance upon Title VII of the Organized Crime Control Act of 1970, 18 U.S.C. 3504. In Section 3504 Congress modified the rule in the *Alderman* case, *supra*, by limiting both the conditions for disclosure and the occasions when disclosure might be required at all. The legislative history clearly shows that Congress had no intention in enacting that section to create new remedies for persons allegedly illegally overheard. Moreover, since Section 3504 applies only to electronic surveillance occurring prior to the enactment of the wiretapping provisions of the 1968 Act, it does not apply to the wiretaps in this case and cannot be construed in any way to modify the provisions of the 1968 Act.

ARGUMENT

I

GRAND JURY WITNESSES HAVE NOT BEEN PERMITTED TO CHALLENGE THE EVIDENCE THAT LED THE GRAND JURY TO CALL THEM OR WHICH PROVIDED THE BASIS FOR QUESTIONS ASKED THEM

Our response to petitioners' basic contention that a witness may refuse to answer questions before a grand jury upon his allegation that the subpoenas to appear and the questions asked are based upon allegedly illegal electronic surveillance is fully set forth in our brief in *United States* v. *Egan*, No. 71–263, October Term, 1971, upon which we primarily rely. Factual differences in the cases and arguments stressed by counsel call for a few additional observations on the constitutional issue (Point I) and construction of the statutes relied upon (Point II).

Unlike *Egan*, neither petitioner here invoked his privilege against self-incrimination as grounds for refusing to testify,[5] and hence neither has received a grant of immunity.[6]

The petitioners are not seeking to prevent the use against themselves of their testimony in response to questions based upon the intercepted communications. Rather they seek to block the use of that evidence

[5] Should petitioners be unsuccessful before this Court, a claim of the privilege may subsequently be advanced.

[6] Authorization to seek a grant of immunity with respect to petitioner Parnas has been obtained.

against others—in this instance, Kilgore and Zarowitz, acknowledged targets of the investigation.[7]

As we indicate in our brief in *Egan* (pp. 7–12), the exclusionary rule of the Fourth Amendment has never been construed to accord witnesses the right to seek the suppression of the use against third parties of evidence allegedly illegally seized from such witnesses. Rather the exclusionary rule may be invoked only by one (1) who was the subject of an illegal search and (2) against whom the evidence obtained by the search is sought to be introduced.

A contrary rule would intolerably burden the criminal process. If the Fourth Amendment permits a grand jury witness to exclude evidence seized from him but intended for use against a third party, a witness at trial may exercise the same right. In *Alderman* v. *United States,* 394 U.S. 165, where the claim was made that if any evidence used to convict any of the defendants was illegally seized from any one of them, then reversal of all of their convictions was required, this Court observed:

> There is no necessity to exclude evidence against one defendant in order to protect the

---

[7] Apart from the government's representation that petitioners were not potential defendants, petitioners' failure to assert the privilege against self-incrimination is strong evidence that petitioners are more concerned with the possible use of their testimony against others than against themselves.

As we note in our brief in *Egan* (pp. 10–11), even if petitioners had been targets of the investigation, their proper remedy—aside from their unquestioned right to assert the privilege against self-incrimination—would not be a refusal to testify in the grand jury, but a motion to suppress at trial, *Blue* v. *United States*, 384 U.S. 251.

> rights of another. *No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.* The victim can and very probably will object for himself when and if it becomes important for him to do so [at 174; emphasis supplied].

Here, also, no rights of petitioners would be at stake, even if the court order were technically deficient, since their testimony is sought for use against others. As we point out in our brief in *Egan* (pp. 11–12), the rule urged by petitioners would also seem to permit a non-defendant witness in a criminal trial to move to exclude evidence allegedly unlawfully seized from him that is sought to be introduced against the defendant. The consequence of that rule would be extensive interruption and delay of proceedings at both the grand jury and trial levels in order to accommodate third party claims unrelated to the primary object of the proceeding. Such a rule would "increase to an intolerable degree interference with the public interest in having the guilty brought to book," *Blue* v. *United States,* 384 U.S. 251, 255.

As we note in our brief in *Egan* (pp. 12–18), the current rule, which denies a witness the right to seek suppression of evidence against others, has particular force in the context of grand jury proceedings. The grand jury has "a right to every man's evidence" (*Piemonte* v. *United States,* 367 U.S. 556, 559, n. 2). Regardless of the reasons for their subpoenas, the evidence sought from petitioners is the kind of non-privileged, non-confidential evidence every citizen is

obligated to provide (See *Blair* v. *United States*, 250 U.S. 273). Noting the grand jury's role as "a great historic instrument of lay inquiry into criminal wrongdoing" (*United States* v. *Johnson*, 319 U.S. 503, 512), courts have traditionally refused to allow challenges—including challenges as to the source of its evidence—to divert the grand jury from its business (see generally *Egan* brief pp. 12–18 and *Blair* v. *United States*, *supra*; *Blue* v. *United States*, *supra*).

II

NEITHER THE OMNIBUS CRIME CONTROL ACT OF 1968, 18 U.S.C. 2510, ET. SEQ., NOR THE ORGANIZED CRIME CONTROL ACT OF 1970, 18 U.S.C. 3504, ALTERS THE RULE THAT GRAND JURY WITNESSES CANNOT CHALLENGE THE SOURCE OF THE GRAND JURY'S EVIDENCE

Our principal arguments with respect to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq.*, are set forth in our brief in *Egan*. While we add a few observations concerning that Act, our principal purpose here is to explore petitioner Gelbard's special reliance on Title VII of the Organized Crime Control Act of 1970, 18 U.S.C. 3504.

1. As we point out in our brief in *Egan* (pp. 18–25), the legislative history of 18 U.S.C. 2510, *et seq.* shows clearly that Congress intended no extension of the exclusionary rule nor any alteration of the rules governing standing to move to suppress. In our view, the term "aggrieved person," as employed in Section 2518(10)(a), was used simply as a convenient and

familiar term of description, as with Rule 41(e), Fed. R.Crim.P., intended to be coextensive with the rules which presently govern standing to suppress the products of an unlawful search and seizure (*Alderman* v. *United States,* 394 U.S. 165, 175–176, n. 9). Were it otherwise, then presumably the general language of Rule 41(e) would similarly confer standing upon "person[s] aggrieved" to move to suppress, at least at trial, the use against third parties of evidence obtained in violation of the Fourth Amendment. Moreover, since Section 2518(10)(a) clearly applies to trials, a witness, or even one not a witness[8] could suppress evidence for use against other parties.

Thus, while we believe the omission of grand jury proceedings from Section 2518(10)(a) was clearly

[8] We have already pointed out that under the construction of 18 U.S.C. 2518(10)(a) urged by petitioners, the victim of a search and seizure—even if he is a non-defendant witness—could, as an "aggrieved person," move to suppress competent and material evidence offered at trial against other parties. The same result would follow under Rule 41(e) for a non-defendant witness, as a "person aggrieved." But this is not the limit of the construction since there is no reason, given the import attributed by petitioners to "aggrieved person," to limit the availability of the motion to suppress to witnesses and defendants. Thus, under the facts present in *Wong Sun* v. *United States,* 371 U.S. 471, where narcotics seized from a third party were held inadmissible against one defendant because it was the product of statements made by him at the time of arrest, but were admissible against the co-defendant because the seizure invaded no rights of his, the third party presumably would be able to move to suppress the evidence against the co-defendant.

deliberate,[9] that omission is not necessary for the position we advance. As stated, the consequences which flow from the construction of Section 2518(10)(a) urged by petitioners are equally serious with respect to trial proceedings, to which the statute is clearly applicable. Had Congress intended to effect such a drastic change in the exclusionary rule as permitting the victims of unlawful searches and seizures to exclude evidence against other parties, it would have done so in clear terms.

2. Petitioner Gelbard argues, independent of any claim with respect to 18 U.S.C. 2515 and 2518(10)(a), that Title VII of the Organized Crime Control Act of 1970, 18 U.S.C. 3504, establishes that a witness before a grand jury may challenge the legality of an alleged overhearing upon the witness' allegation that an unlawful interception of his communications has occurred. Neither the express language of the statute nor its legislative history support the conclusion that Section 3504 creates such a statutory privilege.

Section 3504 was the Congressional response to this Court's decision in *Alderman* v. *United States*, 394

---

[9] We do not believe that the consequences of omission of grand juries from the list in Section 2518(10)(a) of proceedings in which suppression motions may be made are changed by the fact that proceedings to hold recalcitrant grand jury witnesses in contempt occur before a court, which is included in the list. In the first place Section 2518(10)(a) deals with suppression of allegedly illegally seized evidence, and, in contempt proceedings, no such evidence is sought to be introduced before the court. Moreover, since all claims of a right not to testify before a grand jury must be passed upon by a court, such a reading of Section 2518(10)(a) would be inconsistent with the deliberate omission of grand juries.

U.S. 165. S. Rpt. No. 617, 91st Cong., 1st Sess., (Sen. Rep.) pp. 64–70.[10] H. Rep. No. 1549, 91st Cong., 2d Sess. (House Rep.) pp. 51, 81–83. Section 3504 modified, with respect to interceptions occurring prior to the passage of Title III of the Omnibus Crime Control Act, the requirement enunciated in *Alderman* of automatic disclosure of the contents of intercepted communications to a defendant with standing to suppress the use of such conversations as evidence. Sen. Rep., pp. 62–70.

This the Congress sought to accomplish in two ways. First, Section 3504(a)(2) provides for disclosure, for a determination of admissibility, of overheard conversations intercepted prior to June 19, 1968, only where the information "may be relevant" to a claim of inadmissibility. It permits the *in camera* inspection of the contents of the conversations to determine whether or not the information contained therein may be relevant. Sen. Rep., pp. 65, 67–68, 152–154, and House Rep., p. 51.

Second, Section 3504(a)(3), in effect, establishes a statute of limitations upon claims that evidence of an event derived from the exploitation of an unlawful overhearing. Sen. Rep., 68; House Rep., 52, 80–82. It provides that no claim that evidence of an event is inadmissible on the grounds that evidence was obtained by the exploitation of an unlawful overhearing occurring prior to June 19, 1968 (the date of the

[10] While the original Senate Bill applied to all motions to suppress, it is clear that the primary concern related to the disclosure of unlawfully intercepted communications required under this Court's decision in *Alderman*. Sen. Rep., pp. 64–70.

enactment of 18 U.S.C. 2510, *et seq.*) shall be considered where the unlawful overhearing occurred more than five years *prior* to the event sought to be proved by the evidence. Section 3504(a)(3) thus amounts to a presumption of law that "no evidence of an event can be found tainted by an alleged illegality antedating the event by such a prolonged period of time," House Rep., p. 52, and see, pp. 50–51. See also, Sen. Rep., pp. 68–70, 153.

The Congressional purposes advanced in Section 3504 are contrary to petitioner Gelbard's contention that the statute creates a statutory privilege which may be invoked by witnesses. As stated in the Senate Report, the dual purposes of the statute are:

> (1) to protect legal proceedings against delay, congestion, expense and distraction caused by the unlimited and unrestrained litigation of tenuous allegations that evidence should be suppressed; and (2) to prevent harm to legitimate public and private interests caused by forced disclosure of confidential files clearly unrelated to pending litigation [Sen. Rep., p. 63].

The Report continually reflects concern over the burden upon judicial time and the consequent delay in the handling of criminal cases occasioned by motions to suppress the fruits of unlawful interceptions of communications. Section 3504 was aimed at minimizing the burden on judicial time to the extent consonant with a proper regard for the rights of a *defendant*. Sen. Rep., pp. 63–70, 152–153. It is unreason-

able to suppose that Congress, in striving to reduce the amount of litigation arising from claims of unlawful interception, would at the same time create a new statutory privilege enabling a witness before a grand jury, or at trial, to contest the legality of interceptions before being obligated to testify.

In fact "* * * nothing in section 3504(a)(1) is intended to codify or change present law defining illegal conduct or prescribing requirements for standing to object to such conduct * * *" (Sen. Rep., p. 154). Earlier the same report notes that no "language in proposed section 3504 contain[s] an implication creating new grounds for disclosure or suppression or extending existing one to new forums" (Sen. Rep., p. 154). As with the use of the terminology "aggrieved person" in Section 2518(10)(a), Congress employed the term "party aggrieved" in Section 3504(a) as a convenient term to describe those who have been accorded standing to suppress as evidence the products of an unlawful search and seizure.

The legislative history of specific provisions of Section 3504 shows, if further support is necessary, that the statute did not envision a broadening of the category of those who have standing to suppress. In explaining Section 3504(a)(1), the House Report states:

> Under this provision, upon a charge by the *defendant with standing to challenge the alleged unlawful conduct,* the Government would be required to affirm or deny that an unlawful act involving electronic surveillance had in fact occurred [House Rep., p. 51; emphasis supplied].

Similarly, with respect to Section 3504(a)(2), it stated:

> Under paragraph (2) disclosure of the information shall be required to be made to *a defendant who has demonstrated* the illegality of the electronic surveillance (occurring prior to June 19, 1968) and *his standing* where such information is or "may be" relevant to a claim of inadmissibility [House Rep., p. 51; emphasis supplied].

It is equally clear from the Senate Report, which at all times refers to a "defendant," that use of the term "party aggrieved" conveys nothing more than the individual who under existing law has standing to suppress the products of an alleged unlawful interception of communications, Sen. Rep., pp. 62–70.

In any event, since the application of 18 U.S.C. 3504 is limited to interceptions occurring prior to the enactment, on June 19, 1968, of Title III of the Omnibus Crime Control Act, the statute cannot be invoked by petitioners[11] or construed as modifying the provisions of Title III.

Section 3504(a)(2) provides for the procedures applicable to disclosure only where the claim of inadmissibility relates to an unlawful electronic surveillance which occurred prior to June 19, 1968. Similarly, subparagraph (3) establishes a five-year limitation

[11] The intereceptions forming the basis of petitioners' claim occurred in 1970 and were obtained pursuant to the provisions of 18 U.S.C. 2518.

solely with respect to claims that the alleged inadmissible evidence was obtained by the exploitation of an unlawful overhearing which occurred prior to June 19, 1968. Thus, the express language of the statute indicates it is addressed to the problems of unlawful interception occurring prior to the passage of Title III of the Omnibus Crime Control Act, and Section 3504(a)(1) should be read in conjunction with the other subsections to be limited to surveillence before June 19, 1968. This view is reinforced by the legislative history of the statute.

Although the original Senate Bill (S. 30, Sen. Rep., pp. 15–16) applied to motions to suppress generally (Sen. Rep., pp. 62–70),[12] the bill was amended by the House of Representatives, and it was this revised version which was passed by Congress. House Rep., pp. 11–12. The bill in its final form restricted the scope of the original Senate bill by limiting Section 3504 to motions to suppress predicated upon a claim of (1) unlawful electronic surveillance (2) occurring prior to June 19, 1968.

In explaining to his colleagues the scope of Section 3504, Senator McClellan observed:

> [I]t is limited to surveillance that occurred prior to June 1968. * * * Electronic surveillance

[12] As observed in note 10, *supra*, while the original Senate Bill applied generally to motion to suppress, a primary objective of the bill was to modify the procedural requirements enunciated in *Alderman*.

> subsequent to that time is controlled by the 1968 act, where the disclosure requirement is the same as it was set out in title II. See Senate Report No. 1097, 90th Congress, second session at 106 (1968). When the Senate passed title VII, it was not limited to electronic surveillance, so, it was necessary to make it apply to acts occurring after 1968. This new language applies, however, only to surveillance prior to 1968. [116 Cong. Rec., 91st Cong., 2d Sess., No. 179, p. S17775 (October 12, 1970)]

See also the remarks of Congressman Celler, 116 Cong. Rec., 91st Cong., 2d Sess., No. 175, p. H9653 (October 6, 1970).

Moreover, with respect to Section 701 of Public Law 91–452, containing the Congressional Statement of Findings with respect to Section 3504, the House Report observes:

> This section contains a special finding relating *as do the following sections of the title* [Section 3504 in its entirety], to certain evidentiary problems created by electronic surveillance conducted by the Government prior to the enactment of Public Law 90–351 on June 19, 1968, which provided statutory authority for obtaining surveillance warrants in certain types of criminal investigations (18 U.S.C. 2516) * * * [at 501; emphasis supplied].

Because the statute is intended solely to establish procedures governing motions to suppress the contents or fruit of intercepted communications occurring prior to

the enactment of 18 U.S.C. 2510, *et seq.*, the section is inapplicable here.[13]

[13] The only language which could support a view that Section 3504 somehow modified Title III of the 1968 Act is the following from the Senate Report:

> The language used in defining the types of proceedings, types of forums, and jurisdiction in which section 3504 is applicable was taken from 18 U.S.C. § 2515. The only exception is that section 3506 [*sic*] omits legislative committees * * * [w]here a conflict between section 3504 and and another provision dealing with disclosure is presented or is alleged to exist, the provisions of section 3504 are intended to control. See, e.g., 18 U.S.C. § 2518(10)(a), § 3500 [Sen. Rep., p. 154].

However the Report related to Title VII of the original Senate Bill (S. 30). After the House amendment (adopted by the Senate) limiting Section 3504 to electronic surveillance occurring before the effective date of Title III, there is no possibility of any overlap of Title III of the 1968 Act and Title VII of the 1970 Act, let alone a "conflict". For this reason, the above reference in the Senate Report to a possible conflict between Section 3504 and Section 2518(10)(a) is of questionable significance. Moreover, had Congress intended that Section 3504 in effect amend Section 2518(10)(a) to include grand jury proceedings, it is probable that it would have done so by formal amendment. Indeed, Public Law 91-452, the Organized Crime Control Act of 1970, did amend certain provisions of Title III of the Omnibus Crime Control Act of 1968. See 18 U.S.C. 2516(1)(c), and Section 2517(3). In any event, it is more likely that the conflict noted in the Senate Report refers to the fact that Section 3504(a)(3), establishing the five-year statute of limitations with respect to claims that evidence derives from the exploitation of an unlawful act, limited the disclosure provision of 18 U.S.C. 2518(10)(a) by placing a restriction upon the court's discretion to disclose intercepted communications once a motion to suppress is made.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
ALLAN A. TUTTLE,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
SHIRLEY BACCUS-LOBEL,
Attorneys.

MARCH 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972